

Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL

Michael P. Scharf

Ahran Kang

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Scharf, Michael P. and Kang, Ahran (2005) "Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL," *Cornell International Law Journal*: Vol. 38: Iss. 3, Article 12.
Available at: <http://scholarship.law.cornell.edu/cilj/vol38/iss3/12>

This Comment is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL

Michael P. Scharf & Ahran Kang†

Introduction	911
I. Key Lessons from the ICTY, ICTR, and SCSL	916
A. Gaining Credibility in the Community: The Importance of Launching an Effective Outreach Program	916
B. The Importance of Building an Initial Prosecutorial Strategy	918
C. Challenges to the IST's Legitimacy	920
D. Limiting the "Right to Self-Representation"	925
E. To Televisе or Not to Televisе?	930
F. The Role of Fair Trial Observers	933
G. Handling the <i>Tu Quoque</i> Defense	933
H. Protection of Witnesses	935
I. The Preference for Live In-Court Witness Testimony....	937
J. Judicial Notice	940
K. Plea Bargaining	942
Conclusion	946

Introduction

Many mistakes have been made and many inadequacies must be confessed. But I am consoled by the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future.

—Robert H. Jackson¹

On December 10, 2003, the Iraqi Governing Council established the Iraqi Special Tribunal (IST), a unique judicial body created to prosecute

† Michael P. Scharf is Professor of Law and Director of the Frederick K. Cox International Law Center, Case Western Reserve University School of Law. He previously served as Attorney Adviser for United Nations Affairs at the U.S. Department of State, where he played a leading role in the creation of the International Criminal Tribunal for the former Yugoslavia. Professor Scharf and his students at Case Western Reserve University School of Law are part of the Iraqi Special Tribunal's Research Consortium, and this article had its genesis as a research memorandum prepared by Professor Scharf and Ahran Kang (J.D., May 2005) at the request of the Iraqi Special Tribunal Prosecutor in 2004.

1. Report to the President on the Nuremberg Tribunal, October 7, 1946, *quoted in* MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 3* (Carolina Academic Press 1997) [hereinafter SCHARF, *BALKAN JUSTICE*].

Saddam Hussein and other former Iraqi leaders for war crimes, crimes against humanity, genocide, and the crime of aggression.² Shortly thereafter, I (first person references are to Michael Scharf) wrote that the IST would suffer from the misperception of being a “puppet court of the occupying power” since its statute had been drafted during the occupation by the United States, its funding was coming from the United States, its judges were selected by a U.S.-appointed provisional government, and the judges and prosecutors were to be assisted by U.S. advisors.³

Subsequently, I was invited to be one of a handful of international experts selected by the U.S. Department of Justice Regime Crimes Liaison Office to advise the IST judges and prosecutors in the law and the procedure applicable to war crimes trials. Despite my initial misgivings about the IST, I thought it would be better to participate in the process of improving the Tribunal than to remain on the sideline, hurling criticisms at it. During the next several months, I traveled many times to the United Kingdom, where I led a series of training sessions for the IST judges and the IST prosecutors that culminated in a mock trial. What I learned from this experience convinced me that I had been largely wrong about the Iraqi Special Tribunal.⁴ As an introduction to this article, it seems appropriate to begin by describing the four revelations that altered my view about the IST.

First, I learned that Iraqis had played a much greater role in drafting the Statute of the Iraqi Special Tribunal (“IST Statute”) than had been reported in the press. Exhibit A would be the fact that the Iraqis had insisted, over initial U.S. objections, on the inclusion of a provision in the IST Statute (Article 14) that would enable the IST to prosecute Hussein for the crime of aggression, in addition to war crimes, crimes against humanity, and genocide. This is paramount because no one has been charged with the crime of aggression since Nuremberg in 1945.⁵ The United States, which itself has been accused of waging aggressive wars, had successfully blocked its inclusion in the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the permanent International Criminal Court (ICC).⁶ But the Iraqis, who viewed the unprovoked attacks by Hussein against Iran in 1980 and Kuwait in 1990 as tragic follies, would not back down to U.S. pressure. Thus, the inclusion of the crime of aggression was the first signal that the IST would be an Iraqi-led, rather than American-controlled project.

Second, I became convinced that the IST judges would not be under the influence of the United States since the United States did not have any

2. See Statute of the Iraqi Special Tribunal art. 1(b), Dec. 10, 2003, 43 I.L.M. 231, available at <http://iraq-ist.org/en/about/statute.htm> [hereinafter IST Statute].

3. Michael P. Scharf, *Is It International Enough? A Critique of the Iraqi Special Tribunal in Light of the Goals of International Justice*, 2 J. OF INT'L. CRIM. JUST. 330, 331 (2004).

4. See Michael P. Scharf, *Can this Man Get a Fair Trial?*, WASH. POST, Dec. 19, 2004, at B1-B2.

5. *Id.* at B2.

6. *Id.*

direct control over the selection process. The IST judges were selected by the Iraqi provisional government with the assistance of the Iraqi Bar Association, an association of 21,000 lawyers throughout Iraq. During the regime of Hussein, Iraq was a surprisingly litigious society with a thriving legal system presided over by 1,000 judges. From those judges, 150 were excluded from consideration as potential IST judges because they had been affiliated with Hussein's special security courts or were active members of the Ba'ath party. Similarly, a number of jurists in exile were excluded from consideration because they were perceived as potentially being biased against the members of the former regime. Consequently, the Iraqi provisional government could ultimately select its IST judges from a pool of 750 judges.⁷ Thus, the persons selected to be IST judges were an experienced and impartial group of jurists.

In addition, I came away with a good sense of the general character of the IST judges from the training sessions. They are an incredibly committed and brave group, who agreed to risk their lives by accepting their commission. Most impressive in this regard is Raed Johui al-Saadi, the thirty-five year-old Chief Investigating Judge who presided over the initial appearance of Hussein before the IST on July 1, 2004. As a result of extensive media coverage of that event, Judge Raed has become perhaps as recognizable a figure in Iraq as Hussein. Judge Raed told me that he was given the option to hide his face from the cameras during the proceedings, but he declined to do so because he did not want the IST to be subject to the same criticism that has been levied against hooded judges in Peru and Chile. He was willing to put his personal safety at risk as the price to show the face of Iraqi justice and the IST's commitment to fairness. Consequently, his example will be followed by the other IST judges during the oncoming trials. Furthermore, the IST judges indicated that they will acquit defendants if the prosecution does not meet its burden and prove its case. Citing the example of Nuremberg, where three of the twenty-two Nazi defendants were found not guilty, several of the IST judges remarked that they felt that appropriate acquittals in the IST trials would confirm the fairness and impartiality of the Iraqi Special Tribunal. This kind of commitment to fairness will bode well for the IST process.

However, for this special tribunal to be viewed as a truly legitimate court, it must be independent not only of the United States but also of the Iraqi executive and legislative branches, as well as the ordinary Iraqi court system.⁸ The IST will attempt to accomplish this goal through various measures such as prohibiting prosecutors from seeking or receiving "instruc-

7. Although the selected IST judges only have experience in cases involving non-political murder, assault, theft, torts, property and contract disputes, and family law matters and not war crimes or crimes against humanity, this was also the situation with judges serving on the international war crimes tribunals in The Hague, Arusha, and Freetown. Those distinguished international jurists, like IST judges, had to undergo training in this highly specialized field of law before they were ready to preside over war crimes cases.

8. See IST Statute, *supra* note 2, art. 1(a).

tions from any Governmental Department or any source.”⁹ However, the strongest evidence of the IST’s independence will come from the IST judges themselves. For example, during the January 30, 2005 elections in Iraq, interim Iraqi Prime Minister Ayad Allawi repeatedly promised that the trial of Hussein and Chemical Ali would begin imminently, a statement that elicited cheers at every campaign stop. But, the IST judges resisted this pressure to rush the trials, making it clear that trials of this magnitude could not begin for many months, at least not until the judges had been fully trained, the investigating judges and prosecutors had completed their investigations, and the defense counsel had been given adequate time to prepare their case.

Third, I learned that the Department of Justice’s Regime Crimes Liaison Office in Baghdad (RCLO), which was established to assist the IST in training its judges, drafting the IST Rules of Procedure and Evidence (“IST Rules”), and preparing case files for prosecution, would not be the puppet master of the IST. The RCLO is made up of a half-dozen assistant U.S. attorneys and judge advocate general (JAG) officers from across the United States who have volunteered for temporary assignment to Baghdad. The Director of RCLO, Greg Kehoe, noted that this office had been given an extraordinary amount of autonomy from Washington, D.C., which had decided to remain at arm’s-length in order to counter the appearance of undue influence over the IST. Moreover, the RCLO had decided to partner with the internationally respected International Bar Association and other NGOs, which would take the lead in conducting training sessions for the IST judges and IST prosecutors. In contrast to what I initially understood, the RCLO staff will not themselves be filling the advisor slots identified in the IST Statute. Instead, those positions will go to independent experts from around the world selected with the help of the International Bar Association.

Fourth, I became familiar with the IST Statute and Rules, which were designed to fully comply with international human rights standards. Much has been made in the press of U.N. Secretary-General Kofi Annan’s opposition to the IST. These articles have cited Mr. Annan’s concerns about the fairness of the IST procedures and his opposition to the death penalty and these articles have reported his forbiddance of ICTY judges from participating in the IST training sessions. The evidence suggests, however, that Mr. Annan’s actions were more a reflection of his desire to make a statement opposing the U.S. invasion of Iraq than any material substantive and procedural concerns about IST and its due process. The IST Rules, which detail the due process rights of the defendant, were still in the development stage when Mr. Annan voiced his opinion against the IST. Hence, it was ostensibly premature of Mr. Annan to declare that the IST procedures were inconsistent with international norms and standards. The recently released IST Rules¹⁰ address the major concerns voiced by critics

9. *Id.* art. 8(b).

10. Revised Version of Iraqi Special Tribunal Rules of Procedure and Evidence, available at <http://www.iraqispecialtribunal.org/en/laws/rules.htm> [hereinafter IST Rules].

of the IST, especially the potential use of so-called torture evidence against the defendants. In fact, the IST Rules contain a sweeping exclusionary rule, which requires the IST to deem inadmissible any evidence that was not given voluntarily or that was obtained by means that cast substantial doubt on its reliability and veracity.¹¹ Indeed, the IST Rules afford more protection of the rights of the defendant than U.S. law does by providing that all interrogations, following a waiver of the right to remain silent, must be video-taped in order to ensure that no coercive tactics were employed.¹²

As for the issue of the death penalty, I learned after discussing the matter with the IST judges that it was not something that the United States had insisted on, but was something that the Iraqi people strongly felt was a necessary option, at least with respect to defendants who were convicted of genocide, the worst crime known to humankind. In fact, the United States had warned the Iraqis that the insistence on the death penalty would make it difficult to obtain cooperation from the United Nations and European states, which have long opposed this practice.¹³ But Iraq has always had the death penalty, going back to the Code of Hammurabi (1750 BC), history's earliest comprehensive legal text.¹⁴ Moreover, citing the Napoleonic precedent, the Iraqis were extremely concerned that without the death penalty, convicted leaders could one day return to power, as Hussein had done after being released from prison in 1968.¹⁵

Thus, I became convinced that the IST is designed to be fairer and more independent than it had been generally acknowledged and perceived in the press. While it is not a true international tribunal as many of its critics would have preferred, the IST can be characterized as an "internationalized domestic tribunal." It has jurisdiction over international offenses, and its statute provides that the IST should "resort to the relevant decisions of international courts or tribunals as persuasive authority" in interpreting those crimes.¹⁶ Its recently promulgation of the Rules of Procedure, which supplement the existing Iraqi Code of Criminal Procedure, are modeled upon those rules and procedures used by the modern international war crimes tribunals. In addition, while no international judges have been appointed to its bench, its statute and its rules require that international experts be assigned to advise and to assist investigative judges, trial judges, appeals chamber judges, the Prosecutions Department, and

11. Since the IST does not employ a jury, it will follow the civil law model of enforcing the exclusionary rule by requiring that the written judgment of the tribunal may not in any way refer to evidence deemed inadmissible. See Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 393-94 (2001).

12. See IST Rules, *supra* note 10, R. 46(1)(iii).

13. See Press Release, National Coalition to Abolish the Death Penalty, World Coalition Against the Death Penalty Statement (July 1, 2004), http://www.ncadp.org/press_release_7_1_2004_wcadp.html.

14. Claude Hermann & Walter Johns, *Babylonian Law: The Code of Hammurabi*, in ENCYCLOPEDIA BRITANNICA (11th ed. 1910-11), available at <http://www.fordham.edu/hall-sall/ancient/hamcode.html#horne>.

15. See Tiscali.reference, Saddam Hussein, <http://www.tiscali.co.uk/reference/encyclopaedia/hutchinson/m0025716.html> (last visited Nov. 7, 2005).

16. IST Statute, *supra* note 2, art. 17(b).

the Defense Office.¹⁷ As an internationalized court, dealing with international crimes and high level offenders, the IST can learn much from the successes and failures of the ICTY, the ICTR, and the SCSL. This article will examine the key lessons from these three currently active ad hoc tribunals, which will assist the IST in successfully carrying out its mandate.

I. Key Lessons from the ICTY, ICTR, and SCSL

A. Gaining Credibility in the Community: The Importance of Launching an Effective Outreach Program

The Statute calls for the hiring of a "public relations expert" to give "regular briefings to the press and the public at large with respect to the developments relating to the Tribunal."¹⁸ One of the reasons for prosecuting Hussein and his associates is to bring justice and reconciliation to Iraq for the horrors its people had to endure under his rule. However, in order to effectively achieve this goal, in addition to hiring a public relations expert, the IST must also develop an ambitious and comprehensive outreach program that will inform the Iraqis of "the IST's plans, including the proposed timeframe for its activity, and what the IST intends to achieve within it."¹⁹ If the IST does not fully inform the Iraqi people of its mandate and its process, the IST may fail to be "seen as a credible contributor to justice and stability."²⁰ Hence, it is important for the IST to explain to the Iraqis the nature of the indictments the IST issues and to proceed throughout the trials in an open and transparent manner.²¹ The ICTY, ICTR, and SCSL have all implemented outreach programs with varying results.

The ICTY's Outreach Programme mandate was to "bridge the divide separating the [ICTY] in The Hague from the communities it serves in the states and territories that have emerged from [the] former Yugoslavia."²² However, in spite of its mandate, many observers have regarded the ICTY as having failed at developing and implementing an effective outreach program. Instead of focusing on the people in the region about whom the ICTY should have been concerned, the ICTY reached out primarily to its international donors and diplomatic supporters, resulting in widespread misunderstanding and lack of credibility from the people living in the region formerly known as Yugoslavia.²³ For example, in 2003, Gabrielle Kirk McDonald, a former judge and President of the ICTY, complained that notwithstanding the 301-page judgment against the first defendant

17. IST Rules, *supra* note 10, R. 39.

18. IST Statute, *supra* note 2, art. 9(e).

19. U.S. INSTITUTE OF PEACE, BUILDING THE IRAQI SPECIAL TRIBUNAL: LESSONS FROM EXPERIENCES IN INTERNATIONAL CRIMINAL JUSTICE 3 (2004), available at <http://www.usip.org/pubs/specialreport/sr122.pdf> [hereinafter BUILDING THE IRAQI SPECIAL TRIBUNAL].

20. *Id.*

21. *Id.*

22. International Criminal Tribunal for the former Yugoslavia, ICTY Outreach Programme: Introduction, http://www.un.org/icty/bhs/outreach/outreach_info.htm (last visited Nov. 7, 2005) [hereinafter ICTY Outreach Programme].

23. See BUILDING THE IRAQI SPECIAL TRIBUNAL, *supra* note 19, at 3.

before the ICTY, which included "a detailed description of the horrors of the Omarska and Keraterm camps, many [people] in the region still believed [that these stories came from] 'collection centers,' temporarily housing [individuals] who desired to leave the Prijedor area"²⁴ and thus were biased and unreliable. To this day, the ICTY outreach program is still funded by voluntary contributions from outsiders instead of the ICTY itself.²⁵

Similar to the experience of the ICTY, observers of the ICTR also believe that it has largely failed to reach out to the Rwandans and educate them about the ICTR and its purpose. In fact, the Rwandan government is one of the most outspoken critics of the ICTR and its negative view of the ICTR is reflected in the Rwandan popular public opinion.²⁶ Despite eight years of trials of individuals accused of being involved in the Rwandan genocide and other crimes by the Rwandan Patriotic Front, the majority of Rwandans' knowledge and understanding of the ICTR and its operations remains "extraordinarily low."²⁷ In fact, a survey conducted in February 2002 revealed that only 0.7% of respondents believed that they were "well informed" of the ICTR's operations and only 10% of respondents believed that they were "informed" about the work of the ICTR.²⁸ In contrast, 55% of those surveyed claimed to be "not well informed" and 31.3% of respondents stated that they were "not at all informed."²⁹ In addition, a majority of Rwandans feel that the ICTR is "a useless institution, an expedient mechanism for the international community to absolve itself of its responsibilities for the genocide and its tolerance of the crimes of the [Rwandan Patriotic Front]."³⁰

The SCSL, learning from the poor records and experiences of the ICTY and ICTR, placed a stronger emphasis on community outreach from the court's inception. The SCSL's outreach program is widely considered to have played a large role in garnering credibility among the local population.³¹ The SCSL has conducted its outreach program through "town hall forums around the country, ongoing communications through local media, and regular meetings and consultations with a broad range of civil society

24. Gabrielle Kirk McDonald, Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia, (Nov. 6, 2003), in *INTERNATIONAL WAR CRIMES: MAKING A DIFFERENCE?: PROCEEDINGS OF AN INTERDISCIPLINARY CONFERENCE AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW 18-19* (Steven R. Ratner & James L. Bischoff eds., University of Texas at Austin School of Law 2004).

25. ICTY Outreach Programme, *supra* note 22.

26. Timothy Longman, The Domestic Impact of the International Criminal Tribunal for Rwanda, (Nov. 6, 2003), in *INTERNATIONAL WAR CRIMES: MAKING A DIFFERENCE?: PROCEEDINGS OF AN INTERDISCIPLINARY CONFERENCE AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW 36* (Steven R. Ratner & James L. Bischoff eds., University of Texas at Austin School of Law 2004).

27. *Id.*

28. *Id.*

29. *Id.*

30. Kathy Marks, *The Rwanda Tribunal: Justice Delayed*, GLOBAL POLICY FORUM, June 7, 2001, <http://www.globalpolicy.org/intljustice/tribunals/2001/0607icg.htm>.

31. BUILDING THE IRAQI SPECIAL TRIBUNAL, *supra* note 19, at 3.

representatives.”³² The outreach section of the SCSL has also included the involvement of the Chief Prosecutor, David Crane, who for four months traveled the Sierra Leone countryside and visited every district and every major town.³³ Mr. Crane felt it was important to meet the people of Sierra Leone and hear firsthand accounts of their tragedies.³⁴

In addition to town hall meetings, consultations, and communications through local media, the SCSL’s outreach program created *The Special Court Made Simple*, a booklet aimed at making the SCSL’s “mission and procedures more accessible to Sierra Leoneans, especially those at the village level.”³⁵ This booklet explains key concepts relating to the SCSL in simple language and is accompanied by illustrations that communicate the written words. In addition, the booklet includes sections describing each step of the investigative and trial processes and it has sections such as “Who will the Special Court Try?”, “Why was the Special Court for Sierra Leone Created?”, and “How Does the Special Court Work?”³⁶

Hence, like the SCSL, which learned from the mistakes of the ICTY and ICTR, the IST should follow the example of the SCSL and make it a high priority to develop and implement an ambitious outreach program. It is important to inform the Iraqi public of how the IST works and why it was created. As illustrated by the ICTY and the ICTR, if the IST fails to develop an effective outreach program, it risks being dismissed by an indifferent or uninformed Iraqi public as an insignificant and useless court. Although the current security situation may preclude launching some aspects of an outreach program in the near future, the IST should start planning an outreach program and implement initiatives such as publication of a booklet modeled after the SCSL as soon as possible. As the security situation improves, the IST can then take other steps to inform the Iraqi public of its mandate and mission. The IST should do its utmost to ensure that the Iraqis see that the IST is fair in the administration of justice and that the IST is not a kangaroo or puppet court.

B. The Importance of Building an Initial Prosecutorial Strategy

Unlike the ICTY, ICTR, and the SCSL, the IST Statute does not impose any limits on the number of defendants or types of crimes that it may prosecute. But due to limited resources, facilities, and judges, and as a practical matter, the IST should prosecute only defendants accused of serious crimes under the jurisdiction of the IST. The ICTY and ICTR made the mistake of indicting hundreds of individuals, and then having to drop charges, enter into plea bargains, or refer cases back to local courts as the

32. *Id.*

33. David M. Crane, *Dancing with the Devil: Prosecuting West Africa’s Warlords: Building Initial Prosecutorial Strategy for an International Tribunal After Third World Armed Conflicts*, 37 CASE W. RES. J. INT’L. 1, 6 (2005).

34. *See id.*

35. OUTREACH SECTION, SPECIAL COURT FOR SIERRA LEONE, *THE SPECIAL COURT MADE SIMPLE* (2003), available at <http://www.sc-sl.org/specialcourtmadesimple.pdf>.

36. *Id.*

tribunals' workload expanded beyond their capacity. In contrast, shortly after his appointment, the prosecutor of the SCSL mapped out a carefully tailored and successful prosecutorial strategy, which may serve as a good model for the IST.³⁷

The SCSL prosecutor planned his strategy within the context of the SCSL's mandate to "prosecute persons who bear the *greatest responsibility* for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law."³⁸ The operative words in the SCSL's mandate are "greatest responsibility."³⁹ The inclusion of these words means that the court would only prosecute and hold accountable the warlords who were responsible for the murder, rape, maiming, and mutilation of over 500,000 people.⁴⁰ Focusing on those defendants with the greatest responsibility would allow the SCSL to be efficient and effective in dispensing justice by staying within its budgetary and time constraints while simultaneously fulfilling its mandate.⁴¹

The SCSL prosecutor's strategy also included timed-phases from predeployment to trial.⁴² Moreover, the SCSL prosecutor also time-phased the Office of the Prosecutor's movement into Sierra Leone.⁴³ The Office of the Prosecutor started its operation by putting into place its support system, investigators, and finally trial counsel.⁴⁴ The SCSL prosecutor also sought to develop connections with domestic players such as the Sierra Leone government, nongovernmental organizations (NGOs), and the people of Sierra Leone.⁴⁵ In addition, the prosecutor attempted to understand the international dynamics affecting the SCSL trials by such international players as the neighboring states, international criminal cartels, corporations, terrorists, and the heads of state who were engaged in joint criminal enterprises.⁴⁶

Another lesson that the IST should learn from the ICTY and especially from the trial of Slobodan Milošević is that the IST should avoid "mega trials" that deal with events occurring in many places and spanning over long periods of time. Rather than prosecute Hussein in a single trial for crimes that occurred over a twenty-year period in Iraq, Iran, and Kuwait, the IST should conduct five or six mini-trials, each focusing on a distinct and separate event. The incidences should be selected according to the strength of the evidence against Hussein and the magnitude and gravity of the atrocity. Although this will not help to establish a comprehensive his-

37. See Crane, *supra* note 33.

38. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone ¶ 1, U.N.-Sierra Leone, Jan. 16, 2002, <http://www.sc-sl.org/scsl-agreement.html> [hereinafter Agreement between the U.N. and Sierra Leone] (emphasis added).

39. Crane, *supra* note 33, at 2.

40. *Id.* at 1-2.

41. *Id.* at 2.

42. *Id.* at 2, 5, 6.

43. *Id.* at 5.

44. *Id.* at 6.

45. *Id.*

46. *Id.* at 7.

toric record of the atrocities committed under the regime of Hussein, there are other institutions and methods, such as truth commissions, which are better equipped to accomplish that function. This selective approach will ensure that trials can begin promptly and are not prolonged, and that the first judgments against Hussein and his regime are handed down in time to assist Iraq's transition into a democratic nation.

In addition to developing an initial prosecutorial strategy, like the one employed by the SCSL, which would accomplish the mandate of the IST, it is important for the IST investigative judges and the IST prosecutors to also set a "new standard in judicial effectiveness that begins to establish a respect for legal institutions."⁴⁷ This is especially important in Iraq where the IST has an opportunity to positively influence the rebuilding of the legal system and create a legacy of renewed respect for a fair judicial process and the rule of law.

C. Challenges to the IST's Legitimacy

Lawyers hired by Hussein's wife have publicly indicated that they will argue that the IST lacks legitimacy or lawful creation.⁴⁸ Also, during his first pretrial hearing in July, Hussein attacked the legitimacy of the IST by questioning the law upon which the IST was created.⁴⁹ Thus, it is possible that Hussein's intention may be to follow in the footsteps of Milošević, who has been notoriously indignant in his refusal to cooperate with the ICTY. This assumption is buttressed by the fact that Hussein and Milošević share the same lawyer, former U.S. Attorney General Ramsey Clark, who on the eve of Milošević trial, publicly circulated a draft brief whose sole purpose was to discredit the tribunal.⁵⁰ Consequently, the IST should follow the jurisprudence of the ICTY and SCSL as guides as both the ICTY and SCSL have been challenged by defendants on their legality.

The ICTY was established by a Security Council resolution.⁵¹ A defendant by the name Dusko Tadić was the first individual to challenge the legality of the ICTY. The ICTY Trial Chamber held that it was not competent to determine its legality. It stated that:

This International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited

47. *Id.*

48. See Rory McCarthy and Jonathan Steele, *Saddam on Trial: Legitimacy and Neutrality of Court Will Be Challenged*, THE GUARDIAN, July 2, 2004, at 4, available at <http://www.guardian.co.uk/Iraq/Story/0,2763,1252096,00.html>.

49. Rupert Cornwell, *Saddam in the Dock: Listen to His Victims, Not Saddam, Says White House*, THE INDEPENDENT (London), July 2, 2004, available at <http://news.independent.co.uk/world/americas/story.jsp?story=537296> (reporting that Hussein stated, "[t]his is all theater," at his first pretrial hearing).

50. See Defense Brief Challenging the Legitimacy of the Competence of the Yugoslavia Tribunal (copy on file with author), reviewed by Michael P. Scharf, *The Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915, 920 (2003) [hereinafter Scharf, *The Legacy of the Milosevic Trial*].

51. See S.C. Res 808, U.N. Doc. S/RES/808 (1993).

criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.⁵²

The Appeals Chamber of the ICTY in *Prosecutor v. Tadić*, however, disagreed with the Trial Chamber's ruling and instead found that "its inherent power to determine the propriety of its own jurisdiction (*competence de la competence*) permitted review of the legality of the [C]ouncil's actions in establishing the Tribunal."⁵³ The Appeals Chamber thus held that the ICTY had the power to review its own legitimacy and that such power was under the ambit of the Security Council's broad powers to establish the ICTY.⁵⁴ The Appeals Chamber's decision precluded Tadić from raising and trying this issue in a domestic court and from further raising the issue during his ICTY trial.⁵⁵

The Appeals Chamber made an important point in its response to Tadić's argument that the ICTY was not "established by law," a requirement set out in the International Covenant on Civil and Political Rights (ICCPR).⁵⁶ The Appeals Chamber held that the requirement that the tribunal be "established by law" only mandates that the ICTY be "established in accordance with the proper international standards and that [the ICTY must] provide all the guarantees of fairness, justice, and even-handedness, in full conformity with internationally recognized human rights instruments."⁵⁷ The Appeals Chamber determined that the ICTY had fulfilled these requirements, thus dismissing Tadić's appeal.

Six years later, during his initial appearance before the ICTY on July 3, 2001, Milošević verbally announced his intention to challenge the legality of the establishment of the ICTY.⁵⁸ In a pretrial motion, Milošević stated: "I challenge the very legality of this court because it is not established in the basis of law."⁵⁹ He argued that the ICTY was an illegal entity because

52. *Prosecutor v. Tadić*, Case No. IT-94-I, Decision on the Defense Motion on Jurisdiction (Aug. 10, 1995), available at <http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm>.

53. SCHARF, *BALKAN JUSTICE*, *supra* note 1, at 104.

54. *Id.* at 105.

55. *Id.* at 104-05.

56. *Id.* at 105. International Covenant on Civil and Political Rights art. 14(1), opened for signature Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www1.umn.edu/humanrts/instrtree/b3ccpr.htm>. Article 14(1) states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Id. (emphasis added).

57. SCHARF, *BALKAN JUSTICE*, *supra* note 1, at 106.

58. *Prosecutor v. Milosevic*, Case No. IT-02-54, Transcript (July 3, 2001), available at <http://www.un.org/icty/transe54/0107031A.htm>. (Milošević stated, "I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to [sic] illegal organ.").

59. *Milosevic Challenges the Legality of the U.N. Tribunal*, ONLINE NEWSHOUR, Feb. 13, 2002, http://www.pbs.org/newshour/updates/february02/milosevic_2-13.html.

the Security Council did not have the power to establish it.⁶⁰ He further argued that his arrest and transfer to The Hague in the Netherlands were unlawful because those actions were in violation of the Serbian and Yugoslavian constitutions.⁶¹

The Trial Chamber held that the creation of the ICTY was to “restore international peace and security” and thus dismissed Milošević’s motion. The Trial Chamber explained its action by noting that Security Council Resolution 827, which established the ICTY, centered on the ICTY’s role of promoting peace and reconciliation in the former Yugoslavia.⁶² Therefore, the Trial Chamber held that the creation of the ICTY was within the powers of the Security Council under Article 39⁶³ and Article 41⁶⁴ of the Charter of the United Nations.⁶⁵ In ruling whether the Trial Chamber could determine the ICTY’s legitimacy, the Trial Chamber referred to the Appeals Chamber’s decision in *Tadić*, which granted the tribunal the competence to determine its own legality.⁶⁶

The SCSL was created differently than the ICTY. The SCSL was established by a treaty between the government of Sierra Leone and the United Nations to prosecute criminals who had the greatest responsibility for violating international humanitarian law.⁶⁷ However, the government of Sierra Leone also signed the Peace Agreement with the Revolutionary United Front of Sierra Leone, the Lomé Amnesty Agreement, which granted blanket amnesty to all participants in the Sierra Leonean conflict.⁶⁸ In response to this signing, the SCSL Appeals Chamber ruled that the Lomé Amnesty Agreement was not a valid agreement before the SCSL.⁶⁹ But the SCSL Appeals Chamber also noted that it was not vested with the power to determine its own legality and explicitly stated that the ICTY’s *Tadić* decision was not mandatory authority and thus did not bind it.⁷⁰ However, in *Prosecutor v. Taylor*,⁷¹ the Appeals Chamber came to the conclusion that although the SCSL was established in a different manner

60. *Prosecutor v. Milosevic*, Case No. IT-02-54, Decision on Preliminary Motions, ¶ 5 (Nov. 8, 2001), available at <http://www.un.org/icty/milosevic/trialc/decision-e/1110873516829.htm> [hereinafter *Prosecutor v. Milosevic*, Decision on Preliminary Motions].

61. *Id.*

62. *Id.*

63. U.N. Charter art. 39 (giving the Security Council the power to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to “make recommendations, or [to] decide what measures shall be taken in accordance with Article [] [41] . . . to maintain or restore international peace and security”).

64. *Id.* art. 41 (authorizing the Security Council to decide which “measures not involving the use of armed force” will be taken to fulfill Article 39).

65. *Prosecutor v. Milosevic*, Decision on Preliminary Motions, *supra* note 60, ¶ 3.

66. *Id.* ¶ 4.

67. Agreement between the U.N. and Sierra Leone, *supra* note 39.

68. *Prosecutor v. Kallon*, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Mar. 13, 2004), available at <http://www.sc-sl.org/SCSL-04-16-PT-033-1.pdf>.

69. *Id.*

70. Simon Meisenberg, *The Lomé Amnesty Decision of the Special Court for Sierra Leone* (June 28, 2004), available at <http://www.ifhv.de/> (last visited Oct. 5, 2004).

71. *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (May 31, 2004), available at <http://www.sc-sl.org/SCSL-03-01-I-059.pdf>.

than the ICTY and the ICTR, the SCSL was nevertheless established in a lawful manner by the Security Council, which had derived its power from the United Nations Charter.⁷²

It is extremely likely that Hussein and other defendants tried before the IST will seek to challenge its legitimacy and its legality. In addressing the issue, the IST Trial and Appeals Chambers must first determine whether they have the competency to examine their own legality and then they can address the legality of the IST Statute. The precedents from the ICTY and SCSL suggest that IST does have the power to examine its own legality and the legality of its statute.

However, the IST's analysis of its legitimacy will differ from the analysis of the other ad hoc tribunals. Unlike the ICTY and the ICTR, the IST was not created by a U.N. Security Council resolution. Moreover, unlike the SCSL, the IST was not created by a treaty. The IST was established by the Coalition Provisional Authority (CPA) prior to the transfer of sovereignty back to Iraq.

Lawyers for Hussein have argued publicly that the IST is illegitimate because it was created in violation of the Fourth Geneva Convention, which prohibits an occupying power from creating new laws or legal institutions that will exist beyond the time of conflict. Moreover, an occupying power is not permitted to prosecute crimes that predate the occupation.⁷³ However, the Fourth Geneva Convention provides for three exceptions to these prohibitions, which are applicable to the IST.

First, the Convention allows an occupying power to repeal, suspend, or replace the penal laws and processes of the occupied territory where the laws or processes constitute a threat to the security of the peace within the occupied territory or the laws represent an obstacle to the application of the Fourth Geneva Convention.⁷⁴ In addition, the ICTY and the SCSL have held that the U.N. Security Council has the power to create international tribunals as a measure to restore peace and security.⁷⁵ Thus, an analogous argument can be made that the creation of the IST was a measure to restore

72. See *id.* ¶ 37. The Appeals Chamber stated:

It was clear that the power of the Security Council to enter into an agreement for the establishment of the court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41. These powers are wide enough to empower the Security Council to initiate, as it did by Resolution 1315, the establishment of the Special Court by Agreement with Sierra Leone.

Id.

73. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 64, 70, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

74. *Id.* art. 64.

75. Prosecutor v. Milosevic, Case No. IT-99-37-PT, Decision on Preliminary Motions, ¶ 7 (Nov. 8, 2001); Prosecutor v. Gbao, Case No. SCSL-2004-15-AR72(E), Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on Establishment of the Special Court, ¶ 5 (May 25, 2005).

peace and security to the State of Iraq and its creation was thus permissible.

Second, an occupying power is permitted to repeal, suspend, or replace the penal laws and processes of the occupied territory where such action is in the best interest of the population of the occupied territory.⁷⁶ It is through this exception that an occupying power can abolish courts or tribunals that were instructed to apply inhumane or discriminatory laws. An occupying power can create a new penal jurisdiction if it is for "the necessity of ensuring the effective administration of justice."⁷⁷ Under that process it can then appoint judges from the inhabitants of the occupied territory, from the ranks of former judges, or from its own nation. But the applicable laws must be the laws that were valid and enforceable before the occupation.⁷⁸ Since the jurisdiction of the IST covers only crimes as defined in treaties to which Iraq has long been a party and the 1969 Iraqi Penal Code, there is no conflict among Article 65 of the Fourth Geneva Convention and the IST and its statute.⁷⁹

Third, an occupying power may prosecute criminal offenses committed before the occupation if those offenses constitute violations of international humanitarian law.⁸⁰ The crimes listed in the Statute, which include war crimes, genocide, and crimes against humanity, fall under this exception.

Moreover, even though all the rules and the regulations created by the occupational government of the CPA and the Governing Council were only temporary, the interim government ratified and validated the legality of the IST when it became the sovereign power on June 30, 2004. Using the power granted by the U.N. Security Council Resolution 1546, the interim government ratified the IST⁸¹ by permitting its continuance and by directly mentioning it in the Transitional Administrative Law, the governing laws of Iraq during the interim government.⁸² Moreover, the interim government did not diminish the IST authority or jurisdiction in any way. On the contrary, the interim government sustained the power of the IST by funding the Tribunal so that IST judges could be trained and court facility could be built, and by supporting and enforcing the issuance of indictments and the commencement of investigative hearings.

76. See Geneva IV, *supra* note 73, art. 64.

77. *Id.* art. 64.

78. JEAN PICTET, COMMENTARIES TO THE FOURTH GENEVA CONVENTION OF 12 AUGUST 1949, at 336. (discussing article 64).

79. See Geneva IV, *supra* note 73, art. 65.

80. *Id.* art. 70.

81. Under Security Council Resolution 1546, U.N. Doc. S/RES/1546 (2004), the interim government was recognized as having full power and sovereignty of the State of Iraq. The record of debate on the resolution made it clear that the Security Council saw the transfer of power from the CPA to the interim government as the end of occupation. U.N. SCOR, 59th Sess., 4987th mtg. at 2-5, U.N. Doc. S/PV.4987 (June 8, 2004).

82. Law of Administration for the State of Iraq for the Transitional Period art. 48(A), Mar. 8, 2004, available at <http://www.cpa-iraq.org/government/TAL.html> ("The statute establishing the Iraqi Special Tribunal issued on 10 December 2003 is confirmed.").

Moreover, once the power of the interim government was transferred to the newly elected representatives of the transitional government in February 2005, it too confirmed the validity and continuance of the IST. Although it did not explicitly reassert the legitimacy of the IST through legislation, it nevertheless endorsed the IST and its statute by continuing to fund it, a governmental action meant to remove any doubt about the validity of the IST.

Additionally, the legitimacy of the IST is buttressed by its procedural structure. The IST contains all of the due process protections required under international law and guaranteed by all the ad hoc war crimes tribunals. These procedural protections, granted to defendants, include the presumption of innocence, the right to be informed promptly and in detail of the charges and to have adequate time and facilities to prepare a defense and to communicate freely with counsel of choice, the right to be tried without undue delay, the right to be present during trial and to appointment of counsel, the right to have counsel present during questioning, the right to examine and confront witnesses, the right against self-incrimination and not to have courts assume guilt by simply exercising one's right to remain silent, and the right to disclosure by the prosecution of all exculpatory evidence and witness statements, and the right to appeal.⁸³

D. Limiting the "Right to Self-Representation"

Like the Statutes of the ICTY, ICTR, and SCSL, the IST Statute provides that the accused has a right to "defend himself in person or through legal assistance of his own choosing."⁸⁴ It is likely that Hussein, who has a law degree from Cairo University, will follow Milošević's lead and attempt to represent himself during his upcoming trial, notwithstanding the fact that his wife has hired a team of international lawyers to represent him. Hussein has undoubtedly seen the success Milošević has enjoyed using his right to self-representation to transform his criminal trial into a political stage. Also, as Milošević had done before the ICTY, Hussein took the opportunity at his first appearance before the IST on July 1, 2004 to expound his political views as well as to verbally attack the 2003 invasion of Iraq. Therefore, it is not inconceivable that Hussein will attempt to represent himself, with the army of his international lawyers assisting him from behind the scenes.

The ICTY, ICTR, and the SCSL vary in their treatment of the right to self-representation. The ICTY's decision to allow Milošević to represent himself during his trial had significant repercussions on the orderly conduct of the trial. During Milošević's initial appearance before the ICTY, he refused to enter a plea and declined to accept court-appointed legal representation.⁸⁵ The prosecution raised its concern that Milošević would be

83. IST Statute, *supra* note 2, art. 20; IST Rules, *supra* note 10, R. 46, 60, 62.

84. IST Statute, *supra* note 2, art. 20(d).

85. Prosecutor v. Milosevic, *supra* note 58.

unable to adequately represent himself⁸⁶ but the Trial Chamber denied the prosecution's request for appointment of counsel and ruled that even though Milošević has a right to counsel under customary international law, he also "has a right not to have counsel" and "to represent himself."⁸⁷ The Chamber further stated: "It would not be practical to impose counsel on an accused who wishes to represent himself."⁸⁸ This decision enabled Milošević to turn the ICTY Trial Chambers into his own personal stage to make "unfettered speeches throughout the trial" and to mistreat the prosecution, witnesses and the trial chamber judges in a way that would never be permitted by ordinary defense counsel.⁸⁹

But during the same initial appearance, the Trial Chamber also decided to appoint *amicus curiae* counsel.⁹⁰ This decision would not compromise Milošević's right to self-representation since the *amicus curiae*'s role is not to represent Milošević, but rather to ensure that Milošević will get a fair trial by assisting the Trial Chamber in the proper administration of justice. However, appointing *amicus curiae* was not a perfect solution. First, "*amicus* counsel is not a party to the trial and [thus it] may disturb the adversarial nature of the proceeding."⁹¹ Secondly, in this case, the appointment of *amicus* counsel did not substantially affect the trial since rather than defend himself against the charges, Milošević used his time in court to "play on Serbia's psychological vulnerabilities and continued Serb resentment of the 1999 NATO bombing."⁹²

However, the court's decision to appoint legal counsel would have made a difference since in June 2004, it became apparent that for health reasons Milošević would not be able to continue to defend himself before the ICTY.⁹³ His defense was postponed numerous times on account of his ill health and on September 22, 2004, the Trial Chamber concluded that Milošević was not physically fit to represent himself and that if he did continue to do so, there would be further delays.⁹⁴ The Trial Chamber thus ruled that the right to self-representation is not absolute and that the Trial

86. In requesting that the ICTY consider appointing counsel in addition to *amicus* counsel, the prosecution pointed out that Milošević submitted a "confusing" motion that "if counsel were assigned to him, these matters would not be as confusing." Prosecutor v. Milošević, Case No. IT-02-54, Transcript, at 16 (Aug. 30, 2001).

87. *Id.* at 18.

88. *Id.*

89. Michael P. Scharf and Christopher M. Rassi, *Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials?*, 20 OHIO ST. J. ON DISP. RESOL. 3, 4 (2005).

90. Simon Meisenberg, *The Right to Self Representation Before the Special Court for Sierra Leone*, June 19, 2004, available at <http://www.ifhv.de/>.

91. *Id.*

92. *Id.* at 3, quoting Dusko Doder, *Book Review of Slobodan Milosevic and the Destruction of Yugoslavia* by Louis Sell, THE NATION, May 27, 2002, at 25.

93. See Ian Black, *Milosevic's Poor Health Hits Trial: Judge Orders Radical Review as New Delay Halts Defense Case*, THE GUARDIAN, July 6, 2004, available at <http://www.guardian.co.uk/yugo/article/0,2763,1254973,00.html>.

94. Prosecutor v. Milošević, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defense Counsel (Sept. 2, 2004), available at <http://www.un.org/icty/transe54/040902IT.htm>.

Chamber is competent to assign counsel "in the interests of justice."⁹⁵ The Trial Chamber stated that "[t]he fundamental duty of the Trial Chamber is to ensure that the trial is *fair and expeditious*" and it decided to assign counsel to Milošević.⁹⁶ Milošević's amicus curiae appealed the Trial Chamber decision and on November 1, 2004, the ICTY Appeals Chamber ruled in favor of Milošević and decided that he had a right to defend himself but that he must have standby counsel if his "health problems resurface with sufficient gravity."⁹⁷

The ICTR, in *Prosecutor v. Barayagwiza*, however, did not follow the lead of the ICTY and instead imposed counsel on the accused in the interest of justice.⁹⁸ Barayagwiza filed a motion with the Trial Chamber to withdraw his counsel's mandate to represent him. The Trial Chamber refused to grant his motion and held that "only in 'most exceptional circumstances' will Counsel assigned by the Tribunal to represent an accused be permitted to withdraw from the case."⁹⁹ The Trial Chamber further stated that appointed counsel "[is] under an obligation to continue to represent an accused to the best of his [or her] ability, unless the Chamber decides that they are permitted to withdraw."¹⁰⁰ The Trial Chamber observed that Barayagwiza did not lack confidence in his lawyers but wanted them to withdraw from his case because he did not believe he would be given a fair trial.¹⁰¹ The Trial Chamber found this allegation to be without foundation and rejected Barayagwiza's motion because it was "merely boycotting the trial and obstructing the course of justice."¹⁰²

The SCSL encountered the issue of a defendant's right to self-representation in *Prosecutor v. Norman*.¹⁰³ In that case, Sam Hinga Norman, the former Minister of Interior Affairs of Sierra Leone, was jointly charged with two other persons for crimes against humanity and war crimes.¹⁰⁴ After the prosecutor's opening statements, Norman notified the Trial Chamber that he decided to defend himself.¹⁰⁵ During pretrial hearings and motions, Norman was represented by counsel that he had picked. Although the Trial Chamber stated that it was "[m]indful of the International Human Rights norms which guarantee both a right of self-represen-

95. *Id.*

96. *Id.* (emphasis added).

97. *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶ 20 (Nov. 1, 2004), available at <http://www.un.org/icty/milosevic/appeal/decision-e/041101.htm>.

98. *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-T, Decision on Defense Counsel Motion to Withdraw (Nov. 2, 2000), available at <http://www.icttr.org/ENGLISH/cases/Barayagwiza/decisions/021100.htm>.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Prosecutor v. Norman*, Case No. SCSL-04-14-T, Decision on the Application of Samuel Hinga Norman for Self Representation Under Article 17(4)(d) of the Statute of the Special Court (June 8, 2004).

104. Meisenberg, *supra* note 90.

105. *Id.*

tation and a right of legal assistance,"¹⁰⁶ it rejected Norman's request for three reasons. First, Norman was being tried with two co-defendants. Allowing Norman to represent himself would be "to the detriment of the rights of his two co-accused to a fair and expeditious trial."¹⁰⁷ Second, Norman made his request "after over a year of pre-trial detention" and if he was permitted to assume his own defense, it "would necessarily result in unnecessarily prolonging the proceedings."¹⁰⁸ Third, the right to self-representation is not an absolute but a qualified right.¹⁰⁹ The Trial Chamber agreed with a U.S. court decision, which warned that the right to self-representation "threatens to divert criminal trials from their clearly defined purpose of providing a fair and reliable determination of guilt or innocence."¹¹⁰

The SCSL eventually assigned standby counsel to Norman, while preserving his right to self-representation.¹¹¹ The Trial Chamber defined the role of standby counsel by stating that they would "assist [him] in the exercise of [his] self-representation . . . preparation and presentation of [his] case during the trial phase . . . offer legal advice . . . and address the Court whenever [he] request[s] them to address the Court."¹¹² The SCSL's decision to appoint standby counsel instead of *amicus curiae* was significant since standby counsel are party to the trial and thus do not disturb the adversarial process.¹¹³

In the event that Hussein will evoke his right to self-representation, the IST should carefully examine and learn from the trial of the defendant most similar to him, Milošević. Like Milošević, Hussein is a former head of state and is notorious for his alleged war crimes. Moreover, as in the case of Milošević, Hussein's trial is likely to be intently observed not just by his former subjects, the Iraqis, but by the world community. Although the Statute states that the accused has the right to self-representation, it is ambiguous on whether this right is absolute. The *Milosevic Appeals Chamber* held that "the right [to self-representation] may be curtailed on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial."¹¹⁴ And as already illustrated by Milošević's trial and the initial appearance of Hussein, former leaders are likely to act in a disruptive behavior during trial as they publicly challenge the court's authority to try them.

106. *Prosecutor v. Norman*, *supra* note 103.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Prosecutor v. Norman*, Case No. SCSL-04-14-T, Transcript (June 10, 2004), available at <http://www.sc-sl.org/Transcripts/CDF-061004.pdf>.

112. *Id.*

113. Meisenberg, *supra* note 90.

114. *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶¶ 9, 13 (Nov. 1, 2004).

The IST should also consider the extensive U.S. jurisprudence on the subject of self-representation, and pay special attention to the U.S. courts' treatment of disruptive defendants. For example, in *Faretta v. California*, the U.S. Supreme Court held that a defendant has a Sixth Amendment right to conduct his or her own defense in a criminal case.¹¹⁵ However, the U.S. Supreme Court restricted this pronouncement by stating that such a "right of self-representation is not a license to abuse the dignity of the courtroom." As discussed below, since *Faretta*, several federal courts have found that the right to self-representation may be revoked if the defendant abuses this right by acting in a disruptive manner during his or her trial.

Under American jurisprudence, the right to counsel is the paramount right in relation to the right to self-representation.¹¹⁶ The U.S. Court of Appeals for the First Circuit noted: "[I]f [the right to counsel is] wrongly denied, the defendant is likely to be more seriously injured than if denied his [or her] right to proceed pro se."¹¹⁷ However, as in the case of self-representation, the right to counsel has limitations. In *Tuitt v. Fair*, the appellant, who was convicted of armed robbery and carrying a firearm without lawful authority, alleged that his right to counsel was infringed when the court denied his requests for a continuance, for a substitution of counsel, and for permission to proceed unrepresented.¹¹⁸ On appeal, the First Circuit held that "[t]he right to counsel is subject to practical constraints,"¹¹⁹ such that "the right of an accused to choose his own counsel cannot be insisted upon in a manner that will obstruct reasonable and orderly court procedure."¹²⁰ Similarly, in *United States v. Mack*, the United States Court of Appeals for the Ninth Circuit stated that a defendant's right to self-representation does not overcome the court's right to maintain order in the courtroom.¹²¹ The court further reasoned that "[a] defendant does not forfeit his right to representation at trial when he acts out. He merely forfeits his right to represent himself in the proceeding."¹²² The U.S. Court of Appeals for the Second Circuit in *United States v. Cauley* also refused to allow a disruptive defendant to dismiss his legal aid lawyer and proceed unrepresented.¹²³ The court found that his "behavior in court was that of an easily angered man,"¹²⁴ and noted that the defendant "interrupted the

115. 422 U.S. 806, 835 (1975).

116. *Tuitt v. Fair*, 822 F.2d 166, 177 (1st Cir. 1987); *United States v. Mack*, 362 F.3d 597, 601 (9th Cir. 2004); *United States v. Cauley*, 697 F.2d 486, 491 (2d Cir. 1983); *United States v. West*, 877 F.2d 281, 286-87 (4th Cir. 1989); *United States v. Harris*, 317 F. Supp. 2d 542, 544-45 (D.N.J. 2004).

117. *Tuitt*, 822 F.2d at 177.

118. *Id.*

119. *Id.*

120. *United States v. Poulack*, 556 F.2d 83, 86 (1st Cir. 1977).

121. *Mack*, 362 F.3d at 601 (referring to where the appeals court reversed the trial court's conviction because the district court removed the defendant from the courtroom, leaving no one to represent him. The court found this to be a structural error that violated the defendant's rights under the Sixth Amendment).

122. *Id.*

123. 697 F.2d at 491.

124. *Id.* at 490.

cross-examination . . . with shouted obscenities.”¹²⁵ He also refused to answer questions posed to him. Similarly, in *United States v. West*, the U.S. Court of Appeals for the Fourth Circuit sustained the lower court’s ruling that the defendant had forfeited his right to self-representation by attacking its “integrity and dignity by characterizing it as the ‘home team’ on the side of the government” and thus “flouting the responsibility” given to him.¹²⁶ And most recently, in *United States v. Harris*, the federal district court in New Jersey denied a defendant’s request to self-representation¹²⁷ since the court found that the defendant had refused to acknowledge the authority of the court, showed disrespect for the court, and that his attempts to proceed unrepresented were meant to only disrupt the court.¹²⁸

Similar behavior has been found in cases of former leaders prosecuted before war crimes tribunals. As the description of Milošević’s antics above illustrates, these individuals openly question the legitimacy of the court, act disrespectfully toward the judges, make speeches during cross-examination, and browbeat and verbally abuse witnesses. In the ordinary case, a judge can control this behavior by threatening to expel the individual from the courtroom, impose fines or prison time on him or her, or to even suspend the license of an attorney who acted in this a manner. However, these modes of discipline are not available to the judges in cases where the defendant is representing himself or herself. Accordingly, the IST should take into consideration the experiences of the ICTY, ICTR, and SCSL, and rule that this type of inherently disruptive behavior can justify the appointment of defense counsel over the accused’s desire for self-representation in war crimes trials.

E. To Televisе or Not to Televisе?

Public accountability of Hussein’s trial would be enhanced through television cameras in the courtroom by showing the Iraqis a fair judicial process and thus helping them to heal and basically reassuring the public that justice is being carried out. However, there are risks associated with this medium that can be abused and manipulated to Hussein’s advantage. It is likely that Hussein and his lawyers will take a chapter out of Milošević’s trial book and attempt to turn his criminal trial coverage into a political forum to make speeches and political arguments unrelated to the question of his guilt or his innocence.

The ICTY quickly learned about the power of television. Rule 78 of the ICTY Rules of Procedure (“ICTY Rules”) states that “[a]ll proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be

125. *Id.* at 491.

126. 877 F.2d at 287.

127. 317 F. Supp. 2d at 546.

128. *Id.* at 546.

held in public, unless otherwise provided.”¹²⁹ In an effort to achieve one of its aims of helping Serbs, Croats, Albanians and Bosnian Muslims heal their wounds from atrocities committed during wars in the former Yugoslavia, the ICTY televises Milošević’s trial. However, the effects of this decision did not facilitate reconciliation but instead generated admiration and sympathy for Milošević in Serbia.¹³⁰

Milošević appears on television screens back in Serbia as “a solitary individual pitted against an army of foreign lawyers and investigators, [which has helped to] boost his underdog appeal.”¹³¹ Additionally, his “sharp,” “funny,” and “cynical” courtroom dramatic antics has garnered him admiration in Serbia.¹³² It has also been reported in current opinion polls that seventy-five percent of Serbs “do not feel that Milošević is getting a fair trial.”¹³³ Also, sixty-seven percent of Serbs think that Milošević is “not responsible for any war crimes.”¹³⁴

The use of television cameras in U.S. courtrooms has also been the subject of much debate and controversy. The Sixth Amendment of the U.S. Constitution provides that “[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial.”¹³⁵ The U.S. Supreme Court first addressed the issue of cameras in the courtroom in 1965 in *Estes v. Texas*, a criminal case involving an accused embezzler.¹³⁶ In *Estes*, the U.S. Supreme Court agreed with the defendant that he had been deprived of a fair trial due to the disruptive media presence in the Texas courtroom.¹³⁷ Moreover, the U.S. Supreme Court held that while U.S. law favors public proceedings, this safeguard does not require that they be televised or audio recorded. The Supreme Court also noted that “the public has the right to be informed as to what occurs in its courts, but [it is not mandatory that courts protect this right by mandating that cameras be in courtrooms since] reporters are always present [in the courtroom and] if they wish [they can freely] report whatever occurs in open court [without the need of a camera].”¹³⁸

Several American legal commentators and scholars have articulated the advantages and the disadvantages of televising criminal trials in the

129. International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence R. 78, Mar. 14, 1994, U.N. Doc. IT/32/Rev.7, available at <http://www1.umn.edu/humanrts/icty/ct-rules7.html> [hereinafter ICTY Rules].

130. Marc Champion, *Court of Opinion: With Hague Case, Defiant Milosevic Wins Fans at Home As Daily Coverage Keeps Serbs Riveted to TV, Many Feel As if They're on Trial, Too*, WALL ST. J., Jan. 10, 2003, at A1.

131. Scharf, *The Legacy of the Milosevic Trial*, *supra* note 50, at 917.

132. Champion, *supra* note 130.

133. Michael P. Scharf, *Making a Spectacle of Himself: Milosevic Wants a Stage, Not the Right to Provide His Own Defense*, WASH. POST, Aug. 29, 2004, at Outlook, B2.

134. *Id.*

135. U.S. CONST. amend. VI.

136. 381 U.S. 532 (1965), reviewed by David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 799 (1993).

137. *Estes*, 381 U.S. 532.

138. *Id.* at 541-42.

United States. Some of the benefits of televised criminal trials mentioned are: (1) they educate the public on the criminal justice system and the law;¹³⁹ (2) they have therapeutic and cathartic value for the victims and the public; and (3) they allow the public to act "as a check [on] the judicial process."¹⁴⁰ However, there are also often cited reasons for excluding cameras from courtrooms since they affect and usually diminish the defendant's prospect for a fair trial. For example: (1) "[t]he presence of broadcast media can inhibit witnesses" from testifying, thereby, impairing the ability of the prosecution and defense from obtaining evidence;¹⁴¹ (2) cameras "may allow judges and lawyers to play to the camera[s,] creating a celebrity status for them" and thus depriving defendants of effective counsel and fair and impartial decisions by judges;¹⁴² and (3) "heightened public clamor resulting from . . . television coverage will inevitably result in prejudice."¹⁴³

In determining whether a trial should be televised, U.S. courts have resolved this issue differently and based on distinct and varying criteria. For example, some jurisdictions outright prohibit televising trials, while others allow cameras in courtrooms in certain cases but impose guidelines and restrictions on media coverage.¹⁴⁴ For instance, according to state law and a set of guidelines published by the Missouri Supreme Court, media coverage is not permitted in a Missouri courtroom without the express permission of the trial judge.¹⁴⁵ Moreover, a Missouri trial judge has the power to deny permission for media coverage if he or she finds that "media coverage would interfere materially with the rights of a party to a fair trial."¹⁴⁶ The Missouri guidelines also impose responsibilities and restrictions on the use of media equipment.¹⁴⁷

Although, the problems posed by Milošević do not lie solely with the ICTY's decision to televise his trial, it is evident that television is a powerful medium that can be abused by Hussein and his lawyers during his trial. Hence, even though the Statute provides that the IST hearings "shall be public unless the Trial Chamber decides to close the proceedings," the IST should proceed with caution over this issue and avoid the mistakes committed by the ICTY.¹⁴⁸ For example, as an alternative to gavel-to-gavel cov-

139. Harris, *supra* note 136, at 819.

140. Dolores K. Sloviter, *If Courts Are Open, Must Cameras Follow?*, 26 HOFSTRA L. REV. 873, 886 (1998).

141. Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 COLUM. L. REV. 1546, 1552 (1985).

142. Joyce M. Cossin, *The Pros and Cons of Television in the Courtroom*, PSYCH. J., Spring 2003, available at <http://www.wcu.edu/ceap/psychology/journal/pdf/Cossin-j-8-03.pdf>.

143. *Estes*, 381 U.S. 532, at 549.

144. See BETH RIGGETT, *CAMERAS IN THE COURTROOM: A GUIDE TO MISSOURI'S COURT OPERATING RULE 16* (2003), available at <http://www.courts.mo.gov/SUP/index.nsf/0/ea61c4a40450464e86256e36006ffb9?OpenDocument>.

145. *Id.*

146. *Id.*

147. *Id.*

148. IST Statute, *supra* note 2, art. 21(d).

erage, the IST press office could release daily highlights of the trial to the media pool.

F. The Role of Fair Trial Observers

The IST Statute requires the President of the IST to appoint non-Iraqi trial observers or advisers.¹⁴⁹ The role of these appointed observers or advisers is to “provide assistance to the judges with respect to international law and the experience of similar tribunals (whether international or otherwise), and to monitor the protection by the Tribunal of general due process of law standards.”¹⁵⁰ If needed, the President of the IST may call upon the international community for assistance.¹⁵¹ The IST Statute requires that observers or advisers be “persons of high moral character, impartiality and integrity.”¹⁵² Moreover, the IST Statute prefers observers or advisers to be persons who “have acted in either a judicial or prosecutorial capacity in his or her respective country,” or persons who “have experience in international war crimes trials or tribunals.”¹⁵³

Observers and advisors in international law cases, fair trial observers (FTOs), have been used as far back as 1498 and since the end of World War II. With time, their role has become more accepted within the framework of customary international law.¹⁵⁴ Recently, FTOs have been selected from politically unbiased NGOs.¹⁵⁵ FTOs, as formal observers of trials, play an important role in ensuring the effective and fair administration of justice by observing trial processes and applying legal knowledge and training.¹⁵⁶

And even though FTOs have never been used in international criminal tribunals,¹⁵⁷ it does not mean that their participation would not have been beneficial to certain past international criminal tribunal cases. The key goals of a trial observer, according to the International Commission of Jurists’ Guidelines, are as follows:

1. To make known to the court, the authorities of the country and to the general public the interest and concerns motivating the prosecution;
2. To encourage a court to give the accused a fair trial. The impact of an observer’s presence in a courtroom cannot be evaluated with mathematical precision. However, both observers and defense attorneys have pointed out that a monitor’s presence often changes the atmosphere in the courtroom and facilitates the defense by, *inter alia*, making the court more cognizant of

149. *Id.* art. 6(b).

150. *Id.*

151. *Id.*

152. *Id.* art. 6(c).

153. *Id.*

154. Memorandum from Ryan C. Scott, Case Western Reserve University School of Law International War Crimes Research Lab, to the Office of the Prosecutor of the ICTR, *Is There a Role for “Fair Trial Observers” in International Criminal Law Trials?* at 1 (Fall 2003), available at <http://www.law.case.edu/war-crimes-research-portal>.

155. *Id.*

156. *Id.* at 2.

157. *See id.*

the defense's arguments, encouraging the defense counsel and the defendant to be more forceful in contesting the prosecution's claims, and moreover, the presence of an observer will attract the media's attention to the trial;

3. To obtain more information about the conduct of the trial, the nature of the case against the accused and the legislation under which he or she is being tried; and

4. To collect general background information about the political and legal circumstances leading to the trial and their possible effect on the trial's outcome.¹⁵⁸

However, in spite of the many benefits behind employing FTOs, the IST should also be aware of the potential risks associated with use of FTOs. For example, in the trial of the two Libyans accused of bombing Pan Am Flight 103 before a special Scottish court sitting in The Netherlands (the "Lockerbie trial"), the United Nations appointed Dr. Hans Köechler, a professor of Philosophy of Law at the University of Innsbruck, Austria, to observe the trial pursuant to Security Council Resolution 1192, adopted on August 27, 1998.¹⁵⁹ Dr. Köechler produced and delivered a damning report of the administration of justice at the Lockerbie trial, claiming that the outcome of the trial was politically motivated and basically "not fair."¹⁶⁰ Dr. Köechler's report unleashed a torrent of criticism. In response, a spokesman for the Crown Office, which handled the Lockerbie trial, replied that Dr. Köechler had "completely misunderstood" the trial and its procedures.¹⁶¹ Similarly, a member of the Lockerbie briefing unit said that Dr. Köechler "displayed a 'profound misunderstanding' of the Scottish adversarial legal system."¹⁶²

Dr. Köechler's report triggered questions about his role as an international observer of the Lockerbie trial and the general duties of FTOs. Hans Corell, the Under-Secretary-General for Legal Affairs of the United Nations, made a statement that distanced the United Nations from the report.¹⁶³ Mr. Corell insisted that Dr. Köechler's remarks constituted his "personal views" and that the "United Nations [could not] be associated with the observations made" by Dr. Köechler and the other observers.¹⁶⁴ Mr. Corell also stated that Dr. Köechler was "not require[d] to produce and submit" his observations and that he represented his own organization, the International Progress Organization, and not the United Nations at the

158. *Id.* at 10.

159. See S.C. Res. 1192, U.N. Doc. S/RES/1192 (1998); Neil Mackay, *U.N. Claims Lockerbie Trial Rigged: Court was Politically Influenced by U.S.*, THE SUNDAY HERALD (Scotland), Apr. 8, 2001, at 1.

160. HANS KÖECHLER, REPORT ON AND EVALUATION OF THE LOCKERBIE TRIAL (2001), available at <http://i-p-o.org/lockerbie-report.htm>.

161. Mackay, *supra* note 159, at 1.

162. UN Monitor Decries Lockerbie Judgement, BBC NEWS, Mar. 14, 2002, available at <http://news.bbc.co.uk/1/hi/world/1872996.stm>.

163. Letter from Hans Corell, Under-Secretary-General for Legal Affairs, United Nations, to Mr. and Mrs. Cohen (May 31, 2001), available at <http://i-p-o.org/lockerbie-corell.htm>.

164. *Id.*

Lockerbie trial.¹⁶⁵

Dr. Köechler, disagreeing with the United Nations' interpretation of the duties and responsibilities of an international observer, noted that his mission as an observer would have been "meaningless" if he were to simply observe the trial without reporting his observations to anyone.¹⁶⁶ He also stated that "the only meaningful interpretation of 'international observer' . . . must be to observe the proceedings of the court in regard to basic aspects of fairness and due process, and to share the observations, when appropriate, with the United Nations Organization and the international public."¹⁶⁷

Hence, the IST should be careful in its selections of FTOs, since FTOs will play an important "watchdog" role as he or she will be entrusted with the duty to ensure that trials are conducted fairly. Moreover, the participation of FTOs will be significant since the world is watching and the IST will want to show the world community that it can competently police itself. Also, the use of FTOs can serve as a safeguard against charges of victor's justice claims.¹⁶⁸ Accordingly, the IST will have to select unbiased third parties sent by NGOs as their FTOs since these individuals will be fair and thus will satisfy the IST Statute requirement of "impartiality."

G. Handling the *Tu Quoque* Defense

The Latin phrase *tu quoque* means "thou also" or "you too."¹⁶⁹ An accused raising the *tu quoque* defense claims justification for his or her acts as a response to the actions of the State or rebuts the charges of the State by claiming that the State cannot prosecute him or her since the State behaved in a similar culpable manner as the accused.¹⁷⁰ In other words, the accused is saying, "You cannot fairly criticize me on that basis, for you are just as bad. You are doing the same yourself."¹⁷¹ The defense of *tu quoque* is not invoked to convince the other side "to desist from its unlawful conduct . . . but as an estoppel against the [State's] subsequent attempt to call into question the lawfulness of the same kind of conduct of the [accused]."¹⁷² The *tu quoque* defense has been attempted by individuals accused of war crimes, crimes against humanity, and genocide in the Nuremberg tribunal as well as the ICTY. It is likely that Hussein will also

165. *Id.*

166. Statement, Hans Köechler, Misunderstandings and Conflicting Interpretations of His Report on and Evaluation of the Trial, as Expressed in Official Statements and in the Subsequent International Media Coverage, at 1 (June 9, 2001), available at <http://i-p-o.org/Lockerbie-statement-koechler.htm>.

167. *Id.*

168. *See id.*

169. Memorandum from Stephanie Berlin, Case Western Reserve University School of Law International War Crimes Research Lab, to the Office of the Prosecutor of the ICTR, The *Tu Quoque* Defense, at 4 (Nov. 2002), available at <http://www.law.case.edu/war-crimes-research-portal>; Scharf, *The Legacy of the Milosevic Trial*, *supra* note 50, at 925.

170. *See* Scharf, *The Legacy of the Milosevic Trial*, *supra* note 50, at 925.

171. Berlin, *supra* note 169, at 4.

172. *Id.* at 9.

attempt to raise this defense and claim American involvement and culpability in the crimes with which he is charged.

The *tu quoque* defense has had marginal success in the Nuremberg tribunal and the ICTY. Only one defendant at the Nuremberg trial, Grand Admiral Karl Donitz, Commander-in-Chief of the German Navy from 1943 and succeeding to the position of head of state from Adolf Hitler in 1945, was acquitted after he used this defense.¹⁷³ One of Donitz's charges involved waging unrestrictive submarine warfare. In response to this accusation, he argued that his order forbade him from allowing German naval ships to help survivors from a sunken British vessel, the *Laconia*, and that he could not be guilty of waging unrestricted submarine warfare since American navy officers had an identical policy.¹⁷⁴ Donitz's defense procured evidence from U.S. Admiral Chester Nimitz, commander of the American fleet in the Pacific, where the Admiral admitted that the U.S. Navy had a similar policy.¹⁷⁵ Instead of claiming that Donitz's actions were justified because the Americans had a similar policy, Donitz's defense argued that neither the German nor the American policy was itself illegal since "the universality of these acts demonstrated that the laws of war had changed through practice so as to free them of their illegal character."¹⁷⁶ The Nuremberg tribunal, without ever stating that it had accepted Donitz' *tu quoque* defense, did not convict him of unrestricted submarine warfare.

The ICTY addressed this issue in the case of *Prosecutor v. Kupreskic*, where the ICTY Trial Chamber stated that the *tu quoque* defense is "irrelevant because it does not tend to prove or disprove any of the allegations made in the indictment against the accused."¹⁷⁷ The *Kupreskic* case involved six defendants who allegedly helped Bosnian Croat forces kill more than one hundred Bosnian Muslim civilians and destroy property including two mosques in 1993.¹⁷⁸ The six defendants sought to use a *tu quoque* defense and argue that Bosnian Muslims had committed similar or more heinous atrocities against Bosnian Croats in Bosnia and Herzegovina.¹⁷⁹ In rejecting the *tu quoque* defense, the Trial Chamber reiterated its previous view that "the *tu quoque* principle does not apply to international humanitarian law."¹⁸⁰ It further stated that the obligations to comply with international humanitarian law are "designed to safeguard fundamental human values and therefore must be complied with regardless of the conduct of the other party or parties."¹⁸¹

It is likely that Hussein and other members of his former regime will attempt to raise the *tu quoque* defense and argue that the United States,

173. *Id.* at 15.

174. *Id.* at 18.

175. *Id.*

176. *Id.*

177. *Prosecutor v. Kupreskic*, Case No. IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defense of Tu Quoque, at 3 (Feb. 17, 1999).

178. Berlin, *supra* note 169, at 25.

179. *Prosecutor v. Kupreskic*, *supra* note 177, at 3.

180. *Id.*

181. *Id.*

which authorized the Iraqi Governing Council to create the IST, illegally invaded Iraq or were involved in the crimes with which Hussein and his regime are charged. In addition, because the Nuremberg and ICTY tribunals' practice of generally rejecting the *tu quoque* defense has drawn criticism from some quarters of the world, since such a policy reinforces the notion of victor's justice,¹⁸² the IST should be careful in its handling of the *tu quoque* defense so as not appear to be trammeling over the rights of the defendant. Accordingly, the IST may be forced to allow Hussein to raise the issue of the U.S. invasion of Iraq in March 2003 in the context of arguing that the definition of the crime of aggression is not clearly established, as the Nuremberg tribunal allowed Donitz to raise Nimitz's actions to show that the law on submarine warfare had not been clearly defined. However, in other contexts, the IST should only permit Hussein to introduce evidence of U.S. lawlessness or complicity in his crimes that is relevant to disproving his charges or establishing a valid defense.

H. Protection of Witnesses

Frequently in international criminal tribunals, obtaining cooperation of witnesses has hinged on the ability of the prosecution to protect those witnesses.¹⁸³ This issue was first raised in the trial of Dusko Tadić. In that case, much to the chagrin of many ICTY observers, the prosecutor was forced to abandon rape charges after its only rape witness refused to testify.¹⁸⁴ She explained that she and her family had been threatened and thus she was no longer willing to testify.¹⁸⁵

And as important as its ability to ensure cooperation from witness to achieve a conviction, a war crimes tribunal's ability to protect witnesses also directly affects its legitimacy and its image to the world.¹⁸⁶ If criminals are able to intimidate witnesses into refusing to testify, the judicial process will be rendered ineffective and the tribunal's legitimacy will be significantly eroded.¹⁸⁷

As in the case of the IST, the Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY Statute") guarantees the accused the right "to examine, or have examined, the witnesses against him."¹⁸⁸ However, Rule 69 of the ICTY Rules provides for the protection of victims and witnesses. It states that in exceptional circumstances, the prosecutor may request a judge or the Trial Chamber to shield the identity of a particular victim or witness who is in danger until such person is brought under

182. See Berlin, *supra* note 169, at 22.

183. Memorandum from Sarah Suscinski, Case Western Reserve University School of Law International War Crimes Research Lab, to the Office of the Prosecutor, Witness Protection, at 1 (Nov. 2002), available at www.law.case.edu/war-crimes-research-portal.

184. *Id.* at 2.

185. *Id.*

186. *Id.*

187. *Id.*

188. Statute of the International Criminal Tribunal for the former Yugoslavia art. 21(4)(e), May 25, 1993, 32 I.L.M. 1192, available at <http://www.un.org/icty/basic/statut/statute.htm> [hereinafter ICTY Statute].

the protection of the ICTY.¹⁸⁹

Specific measures provided to protect victims and witnesses include nondisclosure to the public or media of the witnesses' identity or their whereabouts.¹⁹⁰ For example, names may be expunged from public court records or testimony may be given through voice-altering devices.¹⁹¹ The ICTY has also created a Victims and Witnesses Section. The Victims and Witnesses Section is a specialized department within the ICTY Registry that provides assistance to victims and witnesses. There are three units of the Victims and Witnesses Section: "the Protection Unit[,] which coordinates responses to the security requirements, the Support Unit[,] which provides social and psychological counseling and assistance to witnesses, and the Operations Unit[,] which is responsible for logistical operations and witness administration."¹⁹² The Victims and Witnesses Unit duties range from assisting disabled witnesses with their travels to temporary or permanent relocating witnesses who have received serious threats to their lives.¹⁹³

But generally, subject to rules providing for specific measures, the identity of victims or witnesses has to be disclosed to the defense to allow him or her sufficient time to prepare his or her case.¹⁹⁴ There is an obvious need to protect witnesses but there is also a need to protect the right of the accused to have a fair trial and the opportunity to confront witnesses who testify against the defendant. This balance was addressed in *Prosecutor v. Tadic*. In that case, the ICTY Prosecutor's Office filed a motion requesting protection of certain witnesses.¹⁹⁵ The prosecution asked that some of the witnesses' identities be kept from the public and the media.¹⁹⁶ For other witnesses, the prosecution asked that their identities be completely shielded from the accused or his lawyers.¹⁹⁷ The Trial Chamber created a five-prong test, which must be satisfied in order to grant a motion of witness anonymity.¹⁹⁸ The requirements are:

1. There must be "an existence of a real fear for the safety of the witness;"
2. The prosecution must show that the witness's testimony is "sufficiently relevant and important to the case;"
3. "There must be no prima facie evidence of the witness's unworthiness in any way;"
4. There is no witness protection program in existence; and

189. ICTY Rules, *supra* note 129, R. 69.

190. *Id.* R. 75.

191. *Id.*

192. ICTY Outreach Programme, *View From The Hague: Witnesses Given Every Support Testifying Before the ICTY*, Feb. 18, 2004, available at <http://www.un.org/icty/bhs/outreach/articles/eng/article-040218e.htm>.

193. *Id.*

194. See ICTY Rules, *supra* note 129, R. 70.

195. Suscinski, *supra* note 183, at 19.

196. *Id.*

197. *Id.*

198. *Id.* at 20.

5. There are no less restrictive protective measures available.¹⁹⁹

In addition, the Trial Chamber also ruled that providing the defendant an opportunity to examine anonymous witnesses does not violate the defendant's rights.²⁰⁰ In addition, the Trial Chamber held that in such cases:

1. Judges must be able to observe the demeanor of the witness "in order to assess the reliability of the testimony."
2. Judges must be aware of the identity of the witness.
3. The defense must be allowed ample opportunity to question the witness on matters unrelated to his or her identity or his or her current whereabouts.
4. The identity of the witness must be disclosed where there is no longer any reason to fear for his or her safety.²⁰¹

However, the *Tadić* Chamber's decision to permit witness anonymity under some circumstances has been highly criticized since the defense counsel cannot conduct an effective and detailed cross-examination if he or she does not know the identity of the witness.²⁰² Perhaps, as a result of this criticism, the ICTY and ICTR tribunals have not subsequently granted a motion precluding the defense from knowing a witness' identity.

Unfortunately, protecting the rights of the defendant has come at a cost. There have been several cases in the ICTY where witnesses were harassed or intimidated by defendants. In 1999, the ICTY found Milan Vujin guilty of "interfering with witnesses in a manner which dissuaded them from telling the truth."²⁰³ Vujin was fined 15,000 NLG (£4,120). Later, defense counsel for Tihomir Blaškić was found in contempt and fined for disclosing the identity and occupation of a protected witness.²⁰⁴ The ICTY in the trial of Blaškić held:

[T]he victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the state of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.²⁰⁵

In the case of IST, prosecutions will heavily depend on witness testimony. The IST Rules also provide for a Victims and Witnesses Unit and measures for the protection of victims and witnesses, which parallels the

199. *Id.* at 20-22.

200. See *id.* at 19-20.

201. *Id.* at 22-23; RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY* 107 (Oxford Univ. Press 2004).

202. See e.g., Michael Scharf and Valerie Epps, *The International Trial of the Century? A "Cross-Fire" Exchange on the First Case Before the Yugoslavia War Crimes Tribunal*, 29 CORNELL INT'L L.J. 635, 654 (1996).

203. KERR, *supra* note 201, at 108.

204. *Id.* at 109.

205. *Id.* at 110.

provisions found in the ICTY and ICTR statutes and rules.²⁰⁶ Some commentators have suggested that international tribunals, such as the IST, could appeal to U.N. member countries to grant political asylum and supply new identities to victims and witnesses, since they fall under the category of persecuted ethnic minorities and thus could arguably qualify for refugee status.²⁰⁷ However, this proposal is troublesome since it could entice witnesses to make false claims in the hope of escaping Iraq.

I. The Preference for Live In-Court Witness Testimony

If the ICTY trials have been a harbinger of things to come for the IST, the issue of live in-court testimony will surely be a contentious matter that the IST judges should examine carefully. There has been sharp criticism of the ICTY's problem of lagging trials, which is attributed in part to the substantial amount of witness testimony. ICTY trials, on average, have a hundred witnesses or more and each witness' testimony can last up to a full trial day.²⁰⁸ A substantial portion of witness testimony involves "background events leading up to indicated offenses, jurisdictional prerequisites to the charges, the impact of the alleged crimes on the victims, or factors that aggravate or mitigate the accused's guilt."²⁰⁹

In an effort to cut down on long and drawn out testimony that is repetitive or testimony that does not go directly to the heart of the charges against the accused, the ICTY has created ways to shorten the amount of time consuming testimony and to ensure speedier trials. Since 1994, the ICTY has revised its Rules of Evidence, which includes provisions related to testimony of witnesses,²¹⁰ and it has undergone numerous revisions in response to time consuming trials and external pressure to fulfill its mandate to try individual "without undue delay."

The original ICTY Rules, enacted in 1994, strongly preferred live in-court witness testimony over written witness testimony. Moreover, Article 21(4)(e) of the ICTY Statute entitles the accused "to examine, or have examined, the witnesses against him,"²¹¹ and Rule 90 of the ICTY Rules originally provided that "witnesses shall, in principle, be heard directly by the Chambers."²¹² However, Rule 89 of the ICTY Rules confers broad discretionary power to the Chamber to "admit any relevant evidence which it deems to have probative value."²¹³ And even though, the original Rule 71

206. IST Rules, *supra* note 10, R. 31, 68.

207. Memorandum from Anna M. Haughton, Case Western Reserve University School of Law International War Crimes Research Lab, to the Office of the Prosecutor, The Balancing of the Rights of the Accused Against the Rights of a Witness in Regard to Anonymous Testimony, at 28 (Dec. 2001), available at <http://www.law.case.edu/war-crimes-research-portal>.

208. Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535, 549 (2001).

209. *Id.*

210. ICTY Statute, *supra* note 188, art. 21(4)(c).

211. *Id.* art. 21(4)(e).

212. ICTY Rules, *supra* note 129, R. 90, reviewed by Wald, *supra* note 208, at 540.

213. ICTY Rules, *supra* note 129, R. 89(c).

of the ICTY Rules, dealing with depositions, stated that witness depositions could only be used in "exceptional circumstances" at trial.²¹⁴ Rule 94*ter* was later added to the ICTY Rules to allow affidavits "to prove a fact in dispute where the affidavit, completed in accordance with the ICTY Rules, corroborated the live [in-court] testimony of a witness."²¹⁵ Under this rule, a witness was required to be present in court and be cross-examined only if the Trial Chamber sustained the opposing party's objection to the witness' affidavit.²¹⁶ In 1999, the ICTY amended the ICTY Rules and removed the requirement that a Trial Chamber find "exceptional circumstances" before it can order that a deposition instead of live in-court witness testimony be used in court.²¹⁷

Today, Rule 94*ter*, allowing for the use of affidavits "to prove a fact in dispute," no longer exists. It has been replaced by Rule 92*bis*, which allows for the admission of affidavits in lieu of live in-court testimony if the testimony "goes to proof of a matter *other than the acts and conduct of the accused as charged in the indictment*."²¹⁸ However, as the case of Rule 94*ter*, Rule 92*bis* requires that a witness appear for cross-examination if the Trial Chambers sustains the object of the opposing party over the witness' affidavit.²¹⁹ This rule is the ICTY's attempt to reestablish the ICTY Rules' original preference of live in-court witness testimony and the ability of the other party to be able to cross-examine the witness.

Rule 92*bis* was prominent in *Prosecutor v. Milosevic* since the prosecutor sought to introduce the written statements of twenty-three witnesses instead of their live in-court testimony. These written statements concerned events such as "attacks, killings and assaults in Kosovo, events that constitute the widespread or systematic campaign of terror and violence that the Prosecution charged the accused with having committed."²²⁰ The prosecution sought to introduce these statements to prove a "crime base," as the statements pertained to crimes committed in Kosovo but not to specific acts committed by Milošević and thus under the ambit of the rule. The Trial Chamber eventually allowed the written testimony with the right of Milošević to subsequently cross-examine the witnesses in court.

However, it was the Appeals Chamber, in *Prosecutor v. Galic*, that clarified the scope of Rule 92*bis* by stating that "where the evidence is *so pivotal* to the Prosecution case, and where the person whose acts and conduct the written statement describes is so proximate to the accused, the Trial Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form."²²¹ However, the Appeals Chamber also held that parties may use Rule 92*bis* to submit written testimony on the

214. ICTY Rules, *supra* note 129, R. 71, reviewed by Wald, *supra* note 208, at 540.

215. ICTY Rules, *supra* note 129, R. 94*ter*, reviewed by Wald, *supra* note 208, at 540.

216. Wald, *supra* note 208, at 540.

217. ICTY Rules, *supra* note 129, R. 71.

218. *Id.* R. 92*bis*(A) (emphasis added).

219. *Id.* R. 92*bis*(E).

220. Megan A. Fairlie, *Due Process Erosion: The Diminution of Live Testimony at the ICTY*, 34 CAL. W. INT'L L.J. 47, 76 (2003).

221. *Id.* at 77 (emphasis omitted).

acts and the conduct of others to establish the state of mind of the accused with respect to the charges.²²² But more importantly, the Appeals Chamber's decision clarifying the scope of Rule 92bis has binding effect on all Trial Chambers.

It is clear from the history of the tribunal's amendments of the provisions on written testimony that live in-court testimony, while preferred, is not always required. Rule 92bis has been describe as having "a dramatic impact on the way in which parties, and in particular the Prosecution, are seeking to present their cases before the [ICTY]."²²³ While a literal interpretation of Rule 92bis only allows the admittance of written testimony that does not address the acts and the conduct of others, commentators maintain that the Appeals Chamber's binding decision can also allow the introduction of written testimony as "background or peripheral evidence."²²⁴

J. Judicial Notice

The Rules of Procedure, as well as the Iraqi Criminal Procedure of Law, which supplements the Rules of Procedure,²²⁵ do not address the issue of judicial notice. However, taking into account the complexity of war crimes trials and the time constraints on the IST, it is important for the IST to address and resolve this issue. Furthermore, to do so, the IST should examine the treatment of judicial notice by other war crimes tribunals and national courts in determining whether and, if so, how the IST should take judicial notice of certain matters in the course of its proceedings.

Judicial notice is defined in Black's Law Dictionary as "[a] court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact."²²⁶ For example, a court may take judicial notice of the indisputable fact that "water freezes at 32 degrees Fahrenheit."²²⁷ The purpose of judicial notice is to "promote expedience in trial proceedings and to prevent flagrant error."²²⁸ This time-saving device is used in both common and civil law legal systems.²²⁹ Judicially noticed facts are traditionally divided into two categories: adjudicative and legislative facts. An adjudicative fact is a fact that is "controlling or operative . . . rather than a background fact"²³⁰ and a fact that "concern[s]

222. *Id.*

223. Gideon Boas, *Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court*, 12 CRIM. L.F. 167, 176 (2001).

224. Fairlie, *supra* note 220, at 78.

225. Iraqi Law on Criminal Proceedings with Amendments, Number 23 of 1971, Decree No. 230 Issued by the Revolutionary Command Council, Feb. 14, 1971, available at <http://www.iraqispecialtribunal.org/en/laws/LawOnCriminalProceedings.htm>.

226. BLACK'S LAW DICTIONARY 863-64 (8th ed. 2004).

227. *Id.* at 864.

228. Marea Beeman, *Judicial Notice*, May 2001, at 3, available at <http://www.law.case.edu/war-crimes-research-portal>.

229. *Id.*

230. BLACK'S LAW DICTIONARY 628.

the immediate parties in a case: 'who did what, where, when, how and with what motive or intent.'²³¹ Moreover, adjudicative facts may also be facts that are generally known or easily verified such as calendar dates,²³² while a legislative fact is a fact that "explains a particular law's rationality and helps a court . . . determine the law's content and application."²³³ Additionally, legislative facts help to "determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take" and "generally transcend the interests of the immediate parties."²³⁴

Unlike the IST, the ICTY and ICTR Rules of Procedure and Evidence address the issue of judicial notice. The ICTY and the ICTR have taken a "hybrid civil/common law approach toward admission of evidence."²³⁵ The ICTY and ICTR Rules of Procedure and Evidence provide that "[a] Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof."²³⁶ In addition, "[a]t the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings."²³⁷ By allowing judicial notice of adjudicated facts or evidence from prior proceedings, the ICTY and ICTR are effectively allowing affidavits to "'prove a fact in dispute' where the affidavit was 'in corroboration of a live [in-court] witness's testimony[.]'"²³⁸ even though prosecutorial attempts to introduce such affidavits pursuant to Rule 94 of the ICTY Rules have been "repelled."²³⁹ Also, the ICTY and ICTR Rules of Evidence and Procedure do not distinguish between adjudicative or legislative facts, but they do require that these facts be part of common knowledge.²⁴⁰

The ICTY Trial Chamber, in *Prosecutor v. Hadzihasanovic*, stated that "by taking judicial notice of an adjudicated fact from another case, the Trial Chamber proceeds from the assumption that the fact is accurate, that it does not need to be re-established at trial but that, insofar as it is an assumption, it may be challenged at trial."²⁴¹ In granting the defense request for judicial notice, the Trial Chamber in *Hadzihasanovic* cited to the Trial Chamber's conclusion in *Krajisnik* that for a fact to be admitted pursuant to Rule 94(B) of the ICTY Rules, the fact must have been "truly adjudicated in previous judgments" and fulfills the following criteria:

231. Beeman, *supra* note 228, at 5.

232. *Id.* at 6.

233. BLACK'S LAW DICTIONARY 629.

234. Beeman, *supra* note 228, at 6.

235. *Id.* at 22.

236. ICTY Rules, *supra* note 129, R. 94(A).

237. *Id.* R. 94(B).

238. ICTY Rules, *supra* note 129, R. 94ter, reviewed by Wald, *supra* note 210, at 540.

239. Wald, *supra* note 208, at 541.

240. See ICTY Rules, *supra* note 129, R. 94(A).

241. *Prosecutor v. Hadzihasanovic and Kubura*, Case No. IT-01-47-T, Final Decision on Judicial Notice of Adjudicated Facts (Apr. 20, 2004), available at <http://www.un.org/icty/hadzihas/trialc/decision-e/040420.htm>.

1. it is distinct, concrete and identifiable;
2. it is restricted to factual findings and does not include legal characterizations;
3. it was contested at trial and forms part of a judgment which has either not been appealed or has been finally settled on appeal; or
4. it was contested at trial and now forms part of a judgment which is under appeal, but falls within issues which are not in dispute on appeal;
5. it does not have a bearing on the criminal responsibility of the Accused;
6. it is not subject of (reasonable) dispute between the Parties in the present case;
7. it is not based on plea agreements in previous cases; and
8. it does not negatively affect on the right of the Accused to a fair trial.²⁴²

In addressing the issue of judicial notice, the IST should follow the examples of judicial notice taken by the ICTY and the ICTR, but apply judicial notice in a transparent manner so that all parties are satisfied that the Tribunal is using judicial notice appropriately.²⁴³ In addition, the IST should notify the opposing party that it is taking judicial notice so that the party is given the opportunity to dispute the use of judicial notice.²⁴⁴ Finally, in deciding whether to take judicial notice, the IST should explicitly distinguish between adjudicative and legislative facts. For example, "[a] previous decision taking judicial notice of a matter as a legislative fact should generally not be authority for notice of the same matter as an adjudicative fact."²⁴⁵ Judicial notice will help to expedite the IST proceedings especially in light of the fact that many of the defendants are charged with the same crimes. However, for judicial notice to be an effective procedural tool, the IST has to ensure that its use of judicial notice is fair and the IST must discourage abuse of the doctrine.

K. Plea Bargaining

The ICTY Statute did not originally provide for plea bargaining and the ICTY judges initially believed that plea bargaining was incompatible with the objectives of international war crimes trials.²⁴⁶ However, as its trials have dragged on, the ICTY has come to incorporate plea bargaining into its process as a procedural necessity in light of its heavy caseload and "complex body of governing law."²⁴⁷ For instance, in *Prosecutor v. Erdemovic*, the Appeals Chamber commented that plea bargains serve an important purpose, taking into account the ICTY's complex and lengthy

242. *Id.*

243. See Beeman, *supra* note 228, at 2.

244. *Id.*

245. *Id.* at 2-3.

246. Michael P. Scharf, *Trading Justice for Efficiency: Plea-Bargaining and International Tribunals*, 2 J. INT'L CRIM. JUST. 1070 (2004).

247. Geoffrey R. Watson, *The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 871, 883 (2003).

proceedings and "stringent" budget concerns.²⁴⁸

Moreover, in October 2003, the President of the ICTY, Theodor Meron, expressed the ICTY's view on the value of plea agreements by stating:

[W]ith properly detailed acknowledgement by defendants of their participation in the crimes for which they acknowledge guilt and genuine expressions of remorse, plea agreements can play a constructive role. In some cases, a forthright and specific acknowledgement of guilt may offer victims as much, or even more, consolation than would a conviction following repeated protestations of innocence.²⁴⁹

In addition, the ICTY's acceptance of a plea bargaining benefits the ICTY, which has been charged with being impartial by some ethnic groups, by legitimizing it.²⁵⁰ A leading commentator on plea bargaining at the ICTY, Nancy Amoury Combs, in her analysis of Biljana Plavsic's guilty plea, states:

Admissions of guilt from high-level defendants confer . . . not only practical benefits, but reputational ones [and a]n admission of guilt proffered by a defendant with such sterling nationalist credentials as the Serbian Iron Lady [Biljana Plavsic] not only provides strong evidence to counteract the self-serving histories that still hold sway among Serbs, but also serves to legitimize the institution that brought the criminal charges in the first place.²⁵¹

And even though the ICTY's acceptance of plea bargaining is an overall positive development,²⁵² Nancy Amoury Combs cautions: "Institutions like the ICTY can impair the very reconciliation they seek to advance if the rewards that they hand out in appreciation for reconciliation become themselves an additional source of bitterness."²⁵³ Consequently, former ICTY President Gabrielle Kirk McDonald has recommended that the following conditions should be present before a tribunal can accept a plea bargain:

1. [t]he complete indictment should be read aloud and a waiver of the reading should not be [permitted];
2. [t]he Prosecutor should be required to give [full] disclosure of the facts that support the indictment;
3. [t]he full plea agreement should be immediately released to the public and if necessary, translated;

248. Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 2 (Oct. 7, 1997), available at <http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojmcd971007e.htm>.

249. Theodor Meron, Address to the United Nations Security Council (Oct. 3, 2003), reprinted in Press Release, ICTY, Address of Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (Oct. 10, 2003), available at <http://www.un.org/icty/latest/index.htm> (under "Archived Press Releases").

250. McDonald, *supra* note 24, at 25.

251. Nancy Amoury Combs, *Prosecutor v. Plavsic*, Case No. IT-00-39&40/1-S. *Sentencing Judgment*, 97 AM. J. INT'L L. 929, 935, 936 (2003).

252. Watson, *supra* note 247, at 882.

253. Combs, *supra* note 251, at 937.

4. [t]he Prosecutor should be required to present testimony from the victims, similar to victim impact statements in the [United States]; and
5. [t]he sentence should reflect the seriousness of the crimes and the judges should avoid any appearance that they are bound [and cannot reject the plea bargain agreements].²⁵⁴

In the case of the IST Rules, Rules 57 and 58 address the issue of plea bargaining. However, the IST can avoid the extensive need for plea bargaining if it creates a prosecutorial strategy, as mentioned above, that will limit the number of defendants that the IST will prosecute.²⁵⁵ But, if the IST finds that plea bargains are a necessity, for example, to obtain critical witness testimony, the IST should be careful to ensure procedural transparency and be cognizant of the potential effects of plea bargaining on the victims and the historic record. It is important in this regard that plea bargains establish a historical record of the events that transpired, and not only those relating to a lesser charge. For this reason, bargaining of sentences is “far less controversial than charge bargaining.”²⁵⁶

Conclusion

There is much the IST can learn both from the successes and missteps of the ICTY, ICTR, and the SCSL in their own attempts to gain credibility and reach out to the people for whom they are serving by conducting these trials. Many of the issues that will arise in the trials of Hussein and other Ba’ath Party leaders have been tested in the real-world judicial laboratory of the three ad hoc tribunals. For example, the right to self-representation will likely be raised in the IST trials and the abundance of analysis in the jurisprudence of the ICTY, ICTR, and SCSL will undoubtedly assist the IST in its decision to either protect this right or curtail it in order to avoid disruption and maintain the integrity of the proceedings. Moreover, the IST is likely to face the *tu quoque* defense, which has had limited success in international war crimes trials. Also, the debates and experiences of procedural devices for judicial efficiency, such as plea bargains and judicial notice, adopted by the ICTY, ICTR and SCSL are likely to be helpful to the IST. Also, procedural and evidentiary matters such as the requirement of live in-court witness testimony and the protection of witnesses are issues that the IST will encounter and which the experience of the other ad hoc tribunals will likely be very useful in helping it solve these issues.

Although the IST Statute specifies that the IST Rules “shall be guided by the Iraqi Criminal Procedure Law,”²⁵⁷ the IST should also examine and consider the case law of the ICTY, ICTR, and SCSL when the IST rules on procedural matters. It will find that such a practice is as useful as its practice of relying on the case law of other international tribunals in interpret-

254. McDonald, *supra* note 24, at 28.

255. *Id.*

256. *Id.*

257. IST Statute, *supra* note 2, art. 16.

ing the crimes within its jurisdiction.²⁵⁸ And to facilitate this process, the major procedural rulings and judgments of the ICTY, ICTR and SCSL should be translated into Arabic without delay, so that they are accessible to the IST.

In closing, I would like to share with you a profound question an Iraqi judge once asked me. It occurred during one of the IST training sessions in England, where the judges were discussing the application of ICTY case law to the IST. One of the judges turned to me and asked: "Do you think in ten years you might be sitting here with a group of judges from another country talking about the application of the case law of the IST to their war crimes tribunal?" Given that the IST judges were already thinking in terms of their judicial legacy suggests that the answer is yes, the IST, too, will undoubtedly make a significant contribution to the development of international humanitarian law.

258. See *id.* art. 17(b).

